

STATE OF MICHIGAN
COURT OF APPEALS

JULIE RODGERS and BENJAMIN RODGERS,

Plaintiffs-Appellants,

v

DALE L. SYVERSON, M.D., and COLON
RECTAL SURGERY CENTER, P.C.,

Defendants-Appellees,

and

BATTLE CREEK HEALTH SYSTEM,

Defendant.

UNPUBLISHED
September 19, 2006

No. 269283
Calhoun Circuit Court
LC No. 05-003217-NO

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff Julie Rodgers¹ appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8), after concluding that plaintiff's claims of battery, infliction of emotional distress, fraud/fraudulent concealment, and loss of consortium sounded in medical malpractice and that plaintiff had failed to file an affidavit of merit as required by MCL 600.2912d(1). We affirm.

The subject matter of this case is surgical treatment rendered to plaintiff by defendant Dale L. Syverson, a board-certified colon and rectal surgeon, on September 12, 2003. On August 13, 2005, a month before the statute of limitations for the medical malpractice claim would have expired, plaintiff sent a "Notice of Intent to File Claim" to defendants. The notice stated, in part:

¹ Because Benjamin Rodgers' claim is derivative of Julie Rodgers' claims, the term plaintiff in the singular will be used throughout this opinion.

Pursuant to MCLA Section 600.2912(b); MSA Section 27A.2912(2), we hereby give notice that it is our intent, on behalf of Julie R. Rodgers and Benjamin Rodgers, to file a claim and to commence an action for medical malpractice against you, Colon Rectal Surgery Center, P.C., and against Battle Creek Health System, your/its agents, ostensible agents, employees, representatives and contractors.

Among the allegations was plaintiff's assertion that Dr. Syverson performed a procedure described as "excision of Bartholin's Gland cyst" on September 12, 2003, without obtaining plaintiff's express and informed consent for an incision in the labial/vaginal area.

On September 5, 2005, plaintiff filed the present complaint that included 4 counts: (I) battery, (II) infliction of emotional distress, (III) fraud/fraudulent concealment, and (IV) loss of consortium. The complaint included three pages of "General Allegations" setting forth the same criticisms of Dr. Syverson's treatments detailed in the notice of intent. Like the notice of intent, the complaint alleged that plaintiff had not been informed that the incision would be made in plaintiff's labial/vaginal area during the September 12, 2003, procedure and that she did not consent to having a surgical incision made in that area.

Defendants filed a motion for summary disposition before filing an answer to the complaint pursuant to MCR 2.108(B). Defendants asserted that, despite plaintiff's labeling of the claims as claims for battery and other intentional torts, the lawsuit was, in reality, an action alleging medical malpractice and that the complaint was subject to dismissal under MCR 2.116(C)(8) for failure to file the supporting affidavit of merit required by MCL 600.2912d(1).

A hearing was held on defendants' motion for summary disposition on February 27, 2006. Citing *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411; 684 NW2d 864 (2004) and "associated law," the trial court found that plaintiff's suit was, in reality, an action alleging medical malpractice and that dismissal was required for failure to file an affidavit of merit. A trial court's decision granting a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCL 600.2912d(1) requires that the complaint be supported by an affidavit of merit in any "action alleging medical malpractice." A plaintiff cannot avoid the procedural requirements attendant to a medical malpractice action merely by couching the claim in terms of a different cause of action. See, e.g., *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999). In determining the nature of a claim, "It is well established that '[t]he gravamen of an action is determined by reading the claim as a whole,' and looking 'beyond the procedural labels to determine the exact nature of the claim.'" *Tipton v William Beaumont Hospital*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (citations omitted). In *Bryant, supra* at 422, the Court established two defining characteristics of medical malpractice claims:

A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "within the course of a professional relationship." . . . Second, claims of medical malpractice necessarily "raise questions involving medical judgment." . . . Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." . . . Therefore, a court must ask two fundamental

questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both those questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.”

Thus, this Court must look at plaintiff’s claim and determine first whether the actions involved occurred within the course of a professional medical relationship, and second, whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If the answer to both of these questions is yes, the procedural and substantive requirements that govern medical malpractice actions must be adhered to.

Here, there can be no dispute that the matter arises out of the professional physician-patient relationship that plaintiff had with Dr. Syverson. There can also be no dispute that the actions in question involved medical treatments provided in the course of that relationship. The allegations in support of the alleged battery² on September 12, 2003, are contained in paragraphs 16 through 19 of the general allegations, as well as paragraph 28 of the complaint:

16. With the multiple recurrences and draining of the subject mass, Julie R. Rodgers presented to The Defendants on September 12, 2003 for “*excision of Bartholin’s gland cyst.*” Before this September 12, 2003 procedure, Dr. Syverson, Julie R. Rodgers and her husband, Benjamin Rodgers, had a detailed discussion about where and what the September 12, 2003 procedure would involve, which even resulted in markings being drawn by Dr. Syverson on the body of Julie R. Rodgers, specifying the location of the incision area.

17. At no time were there any references to surgery in the vaginal or labial area, nor were markings drawn on the vaginal or labial area of the body of Judy R. Rodgers, and at no time did Dr. Syverson state, or otherwise indicate, that he would be excising the Bartholin’s cyst from the vaginal or labial area to accomplish the September 12, 2003, procedure.

18. With this express information from Dr. Syverson, Julie R. Rodgers did not consent to any surgical invasion of her body through the vaginal or labial area by The Defendants. This September 12, 2003 procedure was noted to be an “*out-patient*” procedure.

19. The Defendants’ records indicate that the “*excision of the right buttock mass proved to be a right-sided Bartholin’s gland cyst.*” The Defendants’ records do not, however, reflect that Dr. Syverson performed the September 12,

² The battery forms the basis of each of the counts in the complaint.

2003 procedures through the right labial area of Julie R. Rodgers' body, and without Mrs. Rodgers' consent for the surgery through the labial.

And with regard to Count I, Battery, the complaint states:

28. That the Defendants intentionally and wrongfully made non-consensual physical contact, that is battery, with the Plaintiff, Julie Rodgers, when the Defendants operated on Mrs. Rodgers . . .

Although plaintiff couches her battery claim as one of "nonconsensual touching," a review of plaintiff's allegations reveals that her claim is essentially one of lack of informed consent. That is, plaintiff clearly consented to the surgical procedure, but she alleges in her complaint that she was not informed that an incision would be made in the labial/vaginal area and therefore she did not consent to having an incision made in that area. Claims based on the failure of a physician to adequately obtain informed consent before a procedure or to otherwise fail to instruct or advise a patient come within the general rule regarding the need for expert testimony. *Paul v Lee*, 455 Mich 204, 212; 568 NW2d 510 (1997), overruled on other grounds *Smith v Globe Life Ins co*, 460 Mich 446, 455-456 n 2 (1999).³ The nature and extent of information that a surgeon should give a patient before performing a procedure are within this general rule. The manner of performing a particular surgical procedure is not within the general knowledge of laymen. The allegations in this case sound in medical malpractice, not battery.

With regard to Count II, Infliction of Emotional Distress, the complaint states:

31. That the actions of the Defendants in committing said battery on the Plaintiff, Julie Rodgers, constitutes actions which were intentional, extreme, and outrageous.

And with regard to Count III, Fraud/Fraudulent Concealment, the complaint states:

35. Defendants made material representations that they were undertaking to perform invasive contact with Mrs. Rodgers person/body through a very specific approach, which representations were crucial in deciding what course of conduct they would submit to, all with very significant risks to plaintiff.

³ Plaintiff is correct in her assertion that Michigan recognizes and adheres to the common-law right to be free from nonconsensual physical invasions and the corollary doctrine of informed consent. *In re Rosebush*, 195 Mich App 675, 680; 491 NW2d 633 (1992). "If a physician treats or operates on a patient without consent, he has committed an assault and battery and may be required to respond in damages. *Werth v Taylor*, 190 Mich App 141, 146; 475 NW2d 426 (1991) (citations omitted). Consent is implied where a patient seeks treatment or otherwise manifests in intent to submit to the procedure. *Id.* at 145. But the issue is not whether plaintiff pled sufficient facts to establish a cause of action for battery but, rather, whether the gravamen of the claim is medical malpractice.

Counts II, III, and IV are dependent upon a finding that Dr. Syverson committed a battery upon plaintiff. But as noted above, plaintiff's allegations sound in medical malpractice, not battery.

The trial court properly granted defendants' motion for summary disposition with regard to all counts in the complaint given plaintiff's failure to file an affidavit of merit as required by MCL 600.2912d(1).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell